

**IN THE
COMMONWEALTH COURT OF PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA,
by D. MICHAEL FISHER,
Attorney General,

Plaintiff

v.

SOUTHERN TOBACCO, INC.,

Defendant

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No.924 M.D. 2002

COMPLAINT

PRELIMINARY STATEMENT

1. This is an action to enforce the Tobacco Settlement Agreement Act of 2000 (hereafter "TSAA"), 35 P.S. §5671, *et seq.*, which requires tobacco companies whose cigarettes are sold in Pennsylvania to either join the Master Settlement Agreement or establish and fund an escrow account for the benefit of the Commonwealth based on the number of cigarettes sold within the state.

2. Cigarettes manufactured by Southern Tobacco, Inc. (hereafter "Southern") have been sold in Pennsylvania subsequent to the passage of the TSAA. Southern has neither joined the MSA nor adequately funded an escrow account as required by the TSAA. Moreover, it has failed to fulfill its statutory obligations despite being put on notice of those obligations through letters from the Office of Attorney General.

3. Southern brand cigarettes continue to sell in large volumes in Pennsylvania. Because Southern is not paying its escrow obligations it can, and does, sell its products at

artificially low prices thus gaining a price advantage over companies which comply with the TSAA. This manner of generating substantial short-term profits is in direct violation of this Commonwealth's public policy. *See* 35 P.S. §5672(6).

4. A tobacco manufacturer's failure to comply with the TSAA can result in civil penalties, imposition of attorney fees and costs, and a prohibition on the sale of its cigarettes within the Commonwealth. *See* 35 P.S. §5674. In this suit, the Commonwealth seeks those sanctions against Southern for its willful and knowing violations of the TSAA for sales in the years 2000 and 2001.

PARTIES

5. Plaintiff is the Commonwealth of Pennsylvania, by and through its Attorney General, D. Michael Fisher. It is authorized to bring this action pursuant to 35 P.S. §5674(c).

6. Defendant, Southern, is a corporation with a principal place of business at 1231 Limestone Street, Gaffney, South Carolina 29340.

JURISDICTION

7. The Court has jurisdiction over original actions brought by the Commonwealth government pursuant to 42 Pa.C.S. §761(c).

STATUTORY BACKGROUND

8. On November 23, 1998, leading United States tobacco product manufacturers entered into the MSA with the Commonwealth of Pennsylvania. In return for a release of past, present and certain future claims, the MSA obligates these manufacturers to pay substantial

sums to the Commonwealth (tied in part to their volume of sales); to fund a national foundation devoted to educating consumers about the dangers of tobacco use; and to make substantial changes in their advertising and marketing practices and corporate culture.

9. Not every tobacco product manufacturer is a party to the MSA. Recognizing this, the General Assembly enacted the TSAA to ensure the Commonwealth a source of funds for recovery should those manufacturers be found liable for damages caused by their cigarettes and to preclude those companies that do not join from gaining a substantial short term cost-advantage over MSA participants. *See* 35 P.S. §5672(6).

10. Under the TSAA, a tobacco product manufacturer that sells cigarettes after June 22, 2000, must either become a MSA participant or deposit a specific amount of money into a qualified escrow fund based on Pennsylvania sales of its cigarettes as measured by excise tax collections. *See* 35 P.S. §§5673, 5674(a).

11. Each tobacco product manufacturer depositing funds into an escrow fund must also annually certify to the Attorney General that it has complied with that statutory provision. The escrow deposits and certifications are due on or before April 15th of the following year. *See* 35 P.S. §5674(a)(2).

12. Under Section 5673(1)(ii) of the TSAA, the definition of "tobacco manufacturer" includes a first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States.

FACTUAL ALLEGATIONS

13. Southern is a tobacco product manufacturer under the TSAA. It has not become a participating manufacturer in the MSA.

14. The Southern cigarette brands sold in Pennsylvania during 2000 and 2001 were "Golden" and "Dynamic." Southern is the first purchaser for resale in the United States of these brands.

15. "Golden" cigarettes are made in the United Arab Emirates by the Gulf Conversion Company, L.L.C. The Gulf Conversion Company does not own any United States trademarks. Its cigarettes are not made with the intent that they will be sold in the United States.

16. "Dynamic" cigarettes are made in the Philippines exclusively for M'exim International, Ltd. in Singapore. Southern imports them to the United States. They are not made with the intent that they will be sold in the United States.

17. Cigarettes sold in the United States must contain health warnings prescribed by the federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1333, which rotate in accordance with a plan approved by the Federal Trade Commission.

18. At the behest of Southern, "Golden" and "Dynamic" brand cigarettes were packaged with the required health warnings.

19. Southern filed the currently approved health warning plans for "Golden" and "Dynamic" with the Federal Trade Commission.

2000 SALES

20. From June 22, 2000 through December 31, 2000, 3,482,200 Southern brand cigarettes were sold in Pennsylvania. Based on those sales, Southern was required to deposit \$38,828.62 by April 15, 2001 in a qualified escrow fund for the benefit of Pennsylvania. See 35 P.S. §5674(a)(2)(i).

21. On April 18, 2001, Southern notified the Commonwealth that it had deposited \$2,118.00 into an escrow account thereby satisfying the TSAA escrow fund requirements for tobacco product manufacturers.

22. In July, 2001 and again in August, 2001, the Commonwealth notified Southern that the amount it had deposited was not the full amount due and that the account was not a qualified escrow fund under the TSAA because it allowed Southern to unilaterally withdraw funds without obtaining the Commonwealth's approval. Attached as Exhibit A are true and exact copies of the letters sent to Southern.

2001 SALES

23. In the year 2001, 14,173,400 Southern brand cigarettes were sold in Pennsylvania.

24. Based on those sales, Southern was required to deposit \$211,617.37 by April 15, 2002 in a qualified escrow fund for the benefit of Pennsylvania. *See* 35 P.S. §5674(a)(2)(ii).

25. By letter dated April 18, 2002 the Commonwealth again notified Southern that it was required under the TSAA to deposit moneys into a qualified escrow fund for the sale of its cigarettes in Pennsylvania for the year 2000 as well as for those sold in the year 2001. Attached as Exhibit B is a true and exact copy of the letter.

26. Southern did not respond to the Commonwealth's letter. Nor has it placed any monies into a qualified escrow fund for the sale of its cigarettes in Pennsylvania in the year 2001.

SALES IN 2002

27. Over 12 million Southern brand cigarettes have been sold in Pennsylvania during the first nine months of 2002. Extrapolating this rate of sales to a full year, and applying the projected payment rates for sales in 2002, Southern's escrow obligation for its sales during 2002 will exceed \$235,000.

28. Based on Southern's failure to make its required deposits for sales in the years 2000 and 2001, the Commonwealth believes it unlikely that Southern will meet its 2002 escrow obligation by the April 15, 2003 statutory deadline.

COUNT I

VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2000

29. Paragraphs 1 through 28 are incorporated herein by reference.

30. Southern violated section 4(a) of the TSAA when it failed to deposit \$38,828.62 by April 15, 2001 in a qualified escrow fund for the benefit of Pennsylvania based on its year 2000 cigarette sales in Pennsylvania.

31. A tobacco product manufacturer that fails to deposit the proper amount in a qualified escrow fund may be assessed a civil penalty of up to five percent (5%) of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals one hundred percent (100%) of the original amount improperly withheld from escrow that year. *See* 35 P.S. §5674(c)(1). Southern has been in violation of the TSAA for more than twenty days and is therefore subject to the maximum penalty of one hundred percent.

WHEREFORE, the Commonwealth prays that:

a. the Court find and declare that Southern is in violation of the TSAA;

- b. the Court enter an order requiring Southern to deposit \$38,828.62 in a qualified escrow fund within fifteen (15) days;
- c. Southern be assessed a civil penalty in the amount of \$38,828.62;
- d. the Commonwealth be awarded costs and attorney fees; and
- e. the Court grant such other and further relief as it believes just and equitable.

COUNT II

KNOWING VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2000

32. Paragraphs 1 through 31 are incorporated herein by reference.

33. Southern had notice of its statutory obligation to timely deposit \$38,828.62 into a qualified escrow fund based on the sale of its products in Pennsylvania in the year 2000 yet failed to do so.

34. A tobacco product manufacturer that knowingly violates the TSAA may be assessed a civil penalty of up to fifteen percent (15%) of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals three hundred percent (300%) of the original amount improperly withheld from escrow for that year. *See* 35 P.S. §5674(c)(2). Southern has been in violation of the TSAA for more than twenty days and is therefore subject to the maximum penalty of three hundred percent.

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that Southern knowingly violated the TSAA;
- b. the Court enter an order requiring Southern to come into compliance with the TSAA by depositing \$38,828.62 into a qualified escrow fund within fifteen (15)

days;

- c. Southern be assessed a civil penalty in the amount of \$116,485.86;
- d. the Commonwealth be awarded costs and attorney fees; and
- e. the Court grant such other and further relief as it believes just and equitable.

COUNT III

VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2001

35. Paragraphs 1 through 34 are incorporated herein by reference.

36. Southern violated section 4(a) of the TSAA when it failed to deposit \$211,617.37 by April 15, 2002 in a qualified escrow fund for the benefit of Pennsylvania based on its year 2001 cigarette sales in Pennsylvania.

37. A tobacco product manufacturer that fails to deposit the proper amount in a qualified escrow fund may be assessed a civil penalty of up to five percent (5%) of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals one hundred percent (100%) of the original amount improperly withheld from escrow that year. *See* 35 P.S. §5674(c)(1). Southern has been in violation of the TSAA for more than twenty days and is therefore subject to the maximum penalty of one hundred percent.

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that Southern is in violation of the TSAA;
- b. the Court enter an order requiring Southern to deposit \$211,617.37 in a qualified escrow fund within fifteen (15) days;
- c. Southern be assessed a civil penalty in the amount of \$211,617.37;

- d. the Commonwealth be awarded costs and attorney fees; and
- e. the Court grant such other and further relief as it believes just and equitable.

COUNT IV

KNOWING VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2001

38. Paragraphs 1 through 37 are incorporated herein by reference.

39. Southern had notice of its statutory obligation to timely deposit \$211,617.37 into a qualified escrow fund based on the sale of its products in Pennsylvania in the year 2001 yet failed to do so.

40. A tobacco manufacturer that knowingly violates the TSAA may be assessed a civil penalty of up to fifteen percent (15%) of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals three hundred percent (300%) of the original amount improperly withheld from escrow for that year. *See* 35 P.S. §5674(c)(2).

Southern has been in violation of the TSAA for more than twenty days and is therefore subject to the maximum penalty of three hundred percent.

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that Southern knowingly violated the TSAA;
- b. the Court enter an order requiring Southern to come into compliance with the TSAA by depositing \$211,617.37 into a qualified escrow fund within fifteen (15) days;
- c. Southern be assessed a civil penalty in the amount of \$634,852.11;
- d. the Commonwealth be awarded costs and attorney fees; and

- e. the Court grant such other and further relief as it believes just and equitable.

COUNT V

SECOND KNOWING VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT

- 41. Paragraphs 1 through 40 are incorporated herein by reference.

42. Southern has committed two knowing violations of the TSAA by failing either to become a participating manufacturer or to timely deposit sufficient funds into an escrow fund for the sale of its cigarettes in Pennsylvania in the years 2000 and 2001 when it had notice of its statutory obligations to do so.

43. Section 5674 of the TSAA provides that a tobacco product manufacturer that commits two knowing violations is to be prohibited from selling cigarettes to consumers in the Commonwealth for up to two years. Each year that the tobacco product manufacturer fails to comply with the TSAA constitutes a separate offense. *See* 35 P.S. §5674(c)(3).

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that Southern committed two knowing violations of the TSAA;
- b. the Court enter an order prohibiting Southern from selling cigarettes through the stream of commerce to consumers in Pennsylvania for a period of two years;
- c. the Court enter an order granting the Commonwealth the right to confiscate and destroy any and all of Southern's tobacco products offered for sale in Pennsylvania for a period of two years;
- d. the Court enter an order directing Southern to give written notice to all

distributors, agents and sellers of Southern's tobacco products that for two years, Southern's products may not be offered for sale in Pennsylvania;

- e. the Court enter an order mandating that Southern post a surety bond in the amount of \$235,000 to cover the estimated amount required to be escrowed on April 15, 2003 for the sale of its cigarettes in Pennsylvania in 2002;
- f. the Commonwealth be awarded costs and attorney fees, including costs incurred by the Commonwealth to enforce the provisions of the order; and
- g. the Court grant such other and further relief as it believes just and equitable.

Respectfully submitted,

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